STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2018
v	No. 337881 Chippewa Circuit Court
ROBERT LOUIS HENNING, Defendant-Appellant.	LC No. 16-001959-FH

Before: CAMERON, P.J., and METER and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of 10 counts of possession of child sexually abusive material, MCL 750.145c(4), and 10 counts of using a computer to commit a crime, MCL 752.796; MCL 752.797(3)(d). Defendant was sentenced to concurrent prison terms of 32 to 48 months for the 10 child sexually abusive material convictions, to be served consecutively to concurrent prison terms of 56 to 84 months for the 10 computer crime convictions. We affirm.

The charges against defendant arose from the discovery of a hard drive containing child sexually abusive material. On July 31, 2015, Jacqueline Spangler, defendant's wife (now ex-wife), turned over four hard drives to the Chippewa County Sheriff's Department. Spangler testified that she discovered the hard drives in the "fifth wheel" camper in which defendant had been living after he and Spangler separated. Chippewa County Sheriff's Department Undersheriff Greg Postma reviewed one of the hard drives, found suspected child sexually abusive material, and sent the hard drive to the Charlevoix County Sheriff's Office to be analyzed using forensic software. Analysis revealed multiple images and videos containing child sexually abusive material.

On September 17, 2015, Postma executed a search warrant at defendant's new residence. Postma seized a cell phone and a laptop, neither of which contained any child sexually abusive material. Postma also interviewed defendant; a recording of the interview was played for the jury. When questioned about the hard drives, defendant asserted that he had been unable to access the hard drives because they were outdated. Defendant answered in the affirmative when Postma asked him if he downloaded child pornography, but defendant also stated that when he downloaded child sexually abusive material, it was always accidental, and that he deleted it immediately.

On appeal, defendant argues that he was denied the effective assistance of counsel because counsel: (1) failed to call defendant or any other family members or friends to testify, and (2) failed to cross-examine the prosecution's witnesses aggressively. Defendant argues that his daughter, grandson, and friend would have testified about threats Spangler made to defendant, the contentious nature of the divorce between Spangler and defendant, and Spangler's access to and ability to tamper with the hard drives discovered in the fifth wheel. Defendant also argues that his testimony would have explained some of the seemingly incriminating statements he made in his police interview. We disagree.

"Generally, whether a defendant had the effective assistance of counsel 'is a mixed question of fact and constitutional law.' " *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012), quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review findings of fact for clear error and questions of law de novo. *Heft*, 299 Mich App at 80. However, because defendant did not move for a new trial or request a *Ginther*[1] hearing, our review is limited to mistakes apparent on the record. *Heft*, 299 Mich App at 80. On appeal, defendant has submitted affidavits from his daughter, his grandson, and a friend stating that the relationship between Spangler and defendant was contentious, that Spangler had made threats to send defendant to jail, and that Spangler had performed work on computers in the past. However, since these affidavits are not included in the lower court record, we do not consider them on appeal. *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001).

The United States and Michigan Constitutions guarantee a defendant's right to counsel. US Const, Am VI; Const 1963 art 1, § 20. This right "encompasses the right to the 'effective' assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007) (citations omitted). In order to demonstrate ineffective assistance of counsel, a defendant must show (1) "that counsel's performance was deficient" and (2) "that counsel's deficient performance prejudiced the defense." *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007) (quotation marks and citation omitted). To establish deficient performance, a defendant must show "that counsel's performance fell below an objective standard of reasonableness." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). In evaluating a claim of ineffective assistance of counsel, there is a "strong presumption" that counsel's actions constituted sound trial strategy. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). This Court does not "substitute [its] judgment for that of counsel on matters of trial strategy," nor does this Court assess counsel's competence with the "benefit of hindsight." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). A strategic decision can be the basis of a claim of ineffective assistance of counsel only if the strategy was not sound or was unreasonable. *Cline*, 276 Mich App at 637. To establish prejudice, a defendant "must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Id.* (citation omitted).

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Choosing what witnesses to call is a matter of trial strategy, constituting ineffective assistance of counsel only when failure to call any witnesses deprives the defendant of "a substantial defense that would have affected the outcome of the proceeding." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Likewise, decisions regarding how to question witnesses are a matter of trial strategy. *People v Putman*, 309 Mich App 240, 248; 870 NW2d 593 (2015).

In this case, defendant has failed to overcome the strong presumption that counsel's decision on calling witnesses constituted sound trial strategy. At trial, defendant acknowledged that he was voluntarily waiving his right to testify. Additionally, there is no evidence on the record that other witnesses were readily available and willing to provide favorable testimony. Even if this Court were to consider the affidavits submitted on appeal and defendant's otherwise unsubstantiated claims about what he and other witnesses would have testified to at trial, defendant's claim fails because none of the proposed testimony would have established a substantial defense that would have affected the outcome of the trial. *Daniel*, 207 Mich App at 58. There is no dispute that Spangler had access to the hard drives before she turned them over to the police, but there is no evidence in the lower court record or the affidavits that Spangler had the skills to manipulate forensic data on the hard drive. Defense counsel also thoroughly cross-examined Spangler about the circumstances surrounding the divorce. In fact, Spangler admitted that she did not decide to notify the authorities until after the divorce settlement fell through. Defendant also asserts that he could have testified regarding his dyslexia, hearing loss, and general nervousness, which all were factors during the police interview. However, defense counsel cross-examined Spangler about these issues, and the jurors heard the audio of defendant's police interview and could judge whether those factors casted doubt on the admissions defendant made during the questioning.

Defendant also claims that his attorney threatened to quit if defendant insisted on testifying or insisted on calling others to testify, and that this threat was objectively unreasonable. However, since there is no testimony or evidence in the lower court record that defense counsel threatened to quit, and review of an unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record, *Heft*, 299 Mich App at 80, defendant cannot establish ineffective assistance of counsel on this basis. To the contrary, the lower court record indicates that defendant willingly waived his right to testify, and he did not protest when defense counsel stated on the record that the defense would not be calling any witnesses.

Defendant has also failed to overcome the presumption that counsel's cross-examination of the prosecution's witnesses constituted sound trial strategy. *Putman*, 309 Mich App at 248. Defense counsel thoroughly cross-examined Spangler about her access to the hard drives and the contentious nature of the divorce. Counsel also cross-examined Church and Postma, eliciting testimony from Church that he failed to examine defendant's laptop and testimony from Postma that he did not review documents on the hard drive that could have contained identifying information. Therefore, defense counsel's cross-examination effectively addressed all of the deficiencies in the prosecution's case.

Finally, even if defendant is correct that counsel's failure to present defense witnesses or cross-examine prosecution witnesses more aggressively constituted unsound trial strategy, he has failed to establish the existence of a reasonable probability that the outcome of the trial would

have been different had defense counsel pursued everything that defendant proposes on appeal. Spangler's testimony linked defendant to the incriminating hard drive and established that defendant had a history of watching child pornography. Additionally, Postma and Church presented testimony about the review and forensic analysis of the hard drive and the child sexually abusive material it contained. Furthermore, the jury heard the recording of defendant's interview, in which he admitted that he had downloaded child pornography. In short, none of the evidence defendant now proposes adds anything of significance to his case, and, in light of the substantial evidence against him, defendant has failed to establish the existence of a reasonable probability that the proposed testimony would have affected the outcome of the trial.

Affirmed.

/s/ Thomas C. Cameron
/s/ Patrick M. Meter
/s/ Stephen L. Borrello